

grower. Sampling will be done as in whole block diversion except that only partial blocks would be selected and sampled. Growers may divert up to five partial blocks, or 50 percent of a grower's total number of blocks per year. Such block(s) must be mapped and will be sampled as described under whole block diversion. Rows used in partial block diversion must be contiguous.

(4) *In-orchard tank diversion.* Growers wishing to in-orchard tank divert must pick the cherries to be diverted and place them in harvesting tanks. A compliance officer would then probe the tanks for volume measurement and observe the destruction of the cherries on the grower's premises. Growers wishing to take advantage of this option must have at least 10 tanks ready for diversion. The compliance officer has up to five days to come to the grower's premises to observe the diversion after being contacted.

(c) *Compliance.* Growers who voluntarily participate in the grower diversion program must sign and file with the Board a Grower Diversion Application. By signing the application, a grower agrees to the terms and conditions of the grower diversion program as contained in these regulations. To be eligible to receive diversion credit, growers voluntarily choosing to divert cherries must meet the following terms and conditions:

(1) In order to receive a certificate, a grower must demonstrate, to the satisfaction of the Board, that rows or trees which were selected for diversion were not harvested. Trees four years old or younger do not qualify for diversion.

(2) The grower must furnish the Board with a total harvested production amount so the Board can calculate the amount of grower diversion tonnage to be placed on the diversion certificate. The Board will confirm the grower's production amount with information provided by handlers (to which the grower delivers cherries) on Board form Number Two.

(3) The grower must agree to allow a Board compliance officer to visit the grower's orchard to confirm that diversion has actually taken place. If the terms and conditions for whole block, partial block or in-orchard tank diversion are not completed, the Board shall

not issue the grower a diversion certificate. If a grower who chooses random row diversion harvests rows that were designated not to be harvested, the grower should inform the Board immediately of the error. The grower will then be required to divert twice the amount (rows or trees) incorrectly harvested to correct the mistake. The grower will still receive a diversion certificate equal to the original requested amount. However, in instances where a grower is at the end of harvesting the orchard and fails to divert a complete block or specified rows, the Board shall multiply by two the difference between the original diversion amount and the actual diverted amount. The Board shall subtract that amount from the diversion application amount. Thus, the grower would receive a grower diversion certificate equal to a portion of the originally requested amount. If the grower does not inform the Board of such errors, the grower will not receive a diversion certificate.

[63 FR 33528, June 19, 1998, as amended at 64 FR 30232, June 7, 1999]

§ 930.159 Handler diversion.

(a) *Methods of diversion.* Handlers may divert cherries by redeeming grower diversion certificates, by destroying cherries at handlers' facilities (at-plant), by diverting cherry products accidentally destroyed, by donating cherries or cherry products to charitable organizations or by using cherries or cherry products for exempt purposes under § 930.162, including export to countries other than Canada, and Mexico. Once diversion has taken place, handlers will receive diversion certificates stating the weight of cherries diverted. Diversion credit may be used to fulfill any restricted percentage requirement in full or in part. Any information of a confidential and/or proprietary nature included in this application would be held in confidence pursuant to § 930.73 of the order.

(b) *Board notification and handler plan.* Any handler intending to divert cherries or cherry products pursuant to § 930.59 of the order (except through exempt uses under § 930.62 of the order) must notify the Board of such intent and provide a plan by November 1

which shows how the handler intends to meet the restricted percentage obligation, except that, for the 1997-98 season only, the deadline is February 5, 1998. The Board may extend this date in individual cases pursuant to a written request showing good cause why the plan cannot be provided by the due date. A handler will have one year to fulfill such plan. The details of the plan shall include, but not be limited to, the name and address of the handler, the total product processed at-plant, product diverted at-plant, in-orchard diversion certificates redeemed, anticipated donations to charitable outlets, disposition to exempt outlets or uses and detailed plans for how and where such disposition will be made, and inventory reserve amount. It shall also contain an agreement that the proposed diversion is to be carried out under the supervision of the Board and that the cost of such supervision is to be paid by the handler. Supervision of diversion by means other than destruction of the cherries at a handler's facility will be subject to supervision as found necessary by the Board. USDA inspectors or Board employees will supervise diversion of cherry products at the current hourly rate under USDA's inspection fee schedule (7 CFR 52.42). Any cherries not diverted in accordance with the handler's plan will be placed into the secondary inventory reserve or the primary inventory reserve if a secondary inventory reserve has not been established.

(c) *At-plant diversion.* Diversion by disposal at-plant will take place prior to placing the cherries into the processing line. Such diversion will take place under the supervision of USDA Inspection Service or Board employee inspectors. USDA inspectors or Board employees will supervise diversion of cherry products at-plant at the current hourly rate under USDA's inspection fee schedule (7 CFR 52.42).

(d) *Diversion of finished products.* Handlers may be granted diversion credit for finished tart cherry products that are accidentally destroyed during the 1998-1999 crop year (July 1, 1998, through June 30, 1999), and thereafter. To receive diversion credit under this option the cherry products must be owned by the handler at the time of ac-

cidental destruction, be a marketable product at the time of processing, be included in the handler's end of the year handler plan, and have been assigned a Raw Product Equivalent (RPE) by the handler to determine the volume of cherries. In addition, the accidental destruction, and disposition of the product must be verified by either a USDA inspector or Board agent or employee who witnesses the disposition of the accidentally destroyed product. Products will be considered destroyed if they sustain damage which renders them unacceptable in normal market channels.

(e) *Contributions to approved charitable organizations.* When diverting by donating cherries or cherry products to charitable organizations, handlers should follow the requirements specified herein. For contributions to qualify for diversion credit, the contributed product should be marked clearly "NOT FOR RESALE". The receiving organization must be approved by the Board as a qualified recipient of contributions of tart cherry products. Such organizations must be tax-exempt, must not sell the donated products and must be noncompetitive with other tart cherry industry sales outlets. Once products are donated to an organization, the Board must receive satisfactory documentation of the transaction. Handlers should provide the Board with information on how the product was used and the volume of product used.

(f) *Grower diversion certificates.* To satisfy restricted percentage obligations by redeeming grower diversion certificates handlers must present to the Board grower diversion certificates obtained from growers who have diverted cherries by non-harvest, and who have been issued diversion certificates by the Board in accordance with the applicable rules and regulations governing the issuance of grower diversion certificates. For this crop year July 1, 1997, through June 30, 1998, grower diversion certificates will be valid until February 5, 1998.

[63 FR 404, Jan. 6, 1998, as amended at 63 FR 20019, Apr. 22, 1998; 64 FR 9268, Feb. 25, 1999; 64 FR 33009, June 21, 1999; 65 FR 35267, June 2, 2000]